

Supreme Court, U.S.
FILED

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No. _____

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*In The
Supreme Court of the United States*

Jon B. Purcell,
Petitioner,

v.

United States of America, et al.
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner pro se
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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Feres v. United States*, 340 U.S. 135 (1950) was wrongly decided and should be overturned.
2. Whether Petitioner's wrongful death claim must be remanded to the District Court to establish new precedent and subject matter jurisdiction to address "gross/criminal" negligence under the provisions of the FTCA.

PARTIES TO THE PROCEEDING

The list of parties to this proceeding arising from the final decision before the Tenth Circuit Court of Appeals include the following:

- a. Petitioner Jon B. Purcell, Personal
 Representative of the Estate of Jeremy Ross
 Purcell, deceased; and
- b. Respondent The United States of America.

No Corporate disclosure statement under Rule 29.6 is necessary as Petitioner is a private Citizen of the United States of America proceeding pro se.

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OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the 10th Circuit is unreported and is reprinted at Petitioner's Appendix (Pet. App.) A-1 to A-6. *Order addressing Motion to Dismiss Claim pursuant to Federeral Tort Claims Act* is reprinted at Pet. App. B-1 to B-5. *Order addressing Motion to dismiss claims against unnamed individual defendants* is reprinted at Pet. App. C-1 to C-2. *Judgment in a Civil Case* is reprinted at Pet. App. D-1 to D-2.

BASIS FOR JURISDICTION

Petitioner believes **The United States Constitution** and its **First Amendment** confers jurisdiction upon this Court to review this petition for writ of certiorari in addition to 28 U.S.C. §1254(1), arising from a final judgment for the Tenth Circuit filed on June 28, 2005.

Petitioner believes this case presents a federal question challenge against the judicially created *Feres* doctrine, *Feres v. United States*, 340 U.S. 135 (1950), and is of such imperative public importance as to justify this Court's issuance of writ of certiorari.

STATEMENT OF THE CASE

This case arises from a final judgment of the United States Court of Appeals for the Tenth Circuit filed on June 28, 2005. Petitioner affirmatively asserts the judicially created *Feres* doctrine, established in *Feres v. United States*, 340 U.S. 135 (1950), on December 4, 1950, and its “*incident to service*” holding, has denied him equal protection and justice under *The United States Constitution* and *The Federal Tort Claims Act (FTCA)*, *28 U.S.C. 1346 et seq.*, to redress the wrongful death of his son, Marine Corps Private First Class Jeremy Ross Purcell. Petitioner asked this Court to declare the “*incident to service*” bar on judicial redress of “gross negligent acts or omissions of federal government employees resulting in injury or death to a service member unconstitutional.

On January 16, 2001, JEREMY ROSS PURCELL enlisted in the United States Marine Corps on a delayed enlistment program. On August 13, 2001, Jeremy reported to the Recruit Training Battalion, Marine Corps Recruit Depot, San Diego, to begin his basic training, graduating November 9 of that same year. Following graduation, Jeremy was transferred to MCB, Camp Pendleton where he was then sent to Fort Leonard Wood, MO. to attend Military Police Training school. Jeremy returned to Camp Pendleton, assigned to Headquarters Bn, 1st FSSG. Not long after being assigned to the 1st FSSG, a marine attached to the 15th MEU was dropped from the Military Police squad. Jeremy was among half dozen other marines interviewed to replace the dropped marine - he was chosen because of his skills, attitude, military bearing, and other traits which appealed to those in command.

On 28 August 2002, at approximately 1840 Pacific

Daylight Standard Time PDT), Jeremy suffered four (4) gunshot wounds to the chest; one or more of these wounds were fatal. The shooting was the result of negligence on the part of Sergeant Cody W. Ottley, USMC, Third Platoon, First Force Reconnaissance Company, the shooter. Sergeant Ottley was training for Close Quarters Battle (CQB) when the shooting occurred. The exercise in which the shooting occurred was not designed to involve the use of live ammunition. At the time of the shooting, Jeremy was assisting in the pre-deployment training of Third Platoon, First Force Reconnaissance Company in anticipation of their deployment with the 15th Marine Expeditionary Unit, Special Operations Capable (MEU (SOC)). Jeremy and ten (10) other members of Marine Expeditionary Unit Service Support Group 15, Military Police Detachment, were assigned to play an "aggressor" role, in force-on-force training operations. The 1st Special Operations Training Group personnel conducted the training evolution on the date of the shooting.

On the evening of 27 August 2002, Third Platoon, First Force Reconnaissance Company, had participated in a live-fire training exercise in which they fired 5.56mm live ammunition. Sergeant Ottley participated in this live-fire exercise. At the end of the live fire-training exercise of 27 August 2002, some of the members of Third Platoon, to include Sergeant Ottley, had ammunition remaining from the exercise. This remaining ammunition was stored overnight in Third Platoon's living area, at Range 130, under guard.

The following day, 28 August 2002, the 1st Special Operations Training Group (SOTG) instructed the leadership element of Third Platoon, First Force Reconnaissance Company, that the initial training evolution would include live-fire training with the M4A1 carbine, a 5.56mm weapon,

as well as the .45 caliber MEU (SOC) pistol. Jeremy was not involved in the live fire training. After completion of the initial training evolution at approximately 1600 (PST) on 28 August 2002, 1st Special Operations Training Group personnel informed Third Platoon, First Force Reconnaissance leadership element that the second training evolution for the day was to take place at Range 131, Camp Pendleton's MOUT facility. All members of Third Platoon, First Force Reconnaissance Company were instructed by 1st SOTG personnel that they were not to bring any live ammunition to the MOUT facility (Range 131).

The Marines were instructed to bring blank ammunition instead. After receiving notice that the Platoon was going to need 5 .56mm blank ammunition for the next training evolution. Sergeant Ottley went to the Third Platoon's living area at Range 130 to acquire magazines loaded with blank ammunition. Sergeant Ottley acquired two preloaded magazines from his gear, located in the living area. One of the magazines Sergeant Ottley acquired was loaded with 5.56mm blank ammunition. The other was loaded with live, 5.56mm ammunition. Sergeant Ottley's acquisition of the magazine loaded with live 5.56mm ammunition, leftover from 27 August 2002 live-fire training and stored with his gear, was a negligent act on his part. Sergeant Ottley then brought the live magazine of 5.56mm ammunition to the MOUT facility on 28 August 2002, loaded his weapon with the live ammunition and during the course of training, shot and killed Jeremy.

Third Platoon, First Force Reconnaissance leadership personnel exclusively relied on individual Marines to be responsible for their own ammunition checks and verification. This misplaced reliance, and Sergeant Ottley's negligence, cost PRIVATE FIRST CLASS JEREMY R. PURCELL HIS

LIFE.

TWO PRIMARY CAUSAL FACTORS

a. The negligence of Sergeant Ottley in loading a full magazine of live ammunition in a blank-fire, force on force exercise.

b. The mixing of live and blank ammunition without the necessary rigorous and systematic segregation of live rounds from blank rounds during a force on force exercise.

TWO ADDITIONAL CONTRIBUTING FACTORS

a. The Range Safety Officer (RSO) was over-tasked with both safety and instruction duties; this limited his effectiveness as the primary safety representative at the range.

b. The employment of the MILES 2000 system at Range 131 without an Operational Risk Management (ORM) analysis as required by Marine Corps Order 3500.39A.

The investigation revealed failures in practice and procedure that when coupled with human error, resulted in the tragic death of PRIVATE FIRST CLASS JEREMY R. PURCELL.

Because of the astounding degree of negligence on the part of the United States Marine Corps, and those in command at the Marine Corps Base, Camp Pendleton, and because they were put on notice eighteen months previous, with the serious wounding of another marine under almost identical circumstances, that there was a systemic problem in the accountability, storage, and handling of live ammunition during training and did nothing to correct the problem, Petitioner filed his complaint of wrongful death. That complaint was dismissed by the Tenth Circuit Court of

Appeals on June 28, 2005 based on lack of subject matter jurisdiction.

**CONCISE ARGUMENT IN SUPPORT OF
PETITIONER'S QUESTIONS PRESENTED FOR
REVIEW**

In support of Petitioners questions presented for review, Petitioner submits the dissenting opinion of Justices Scalia in United States v. Johnson (1987):

JUSTICE SCALIA, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

As it did almost four decades ago in *Feres v. United States*, 340 U.S. 135 (1950), the Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly .cluded it. We have not been asked by respondent here to overrule *Feres*; but I can perceive no reason to accept petitioner's invitation to extend it as the Court does today.

Much of the sovereign immunity of the United States was swept away in 1946 with passage of the FTCA, which renders the Government liable "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United [481 U.S. 681, 693] States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).